

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1186 of 1992

with

CRIMINAL APPEAL No 333 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE

and

Hon'ble MR.JUSTICE H.R.SHELAT

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

AKBARBHAI ABBASBHAI TINWALA & 2

Versus

STATE OF GUJ

Appearance:

MR E.E.SAIYED, for Appellants in both the Appeals

MR S.T.MEHTA, ADDL.PUBLIC PROSECUTOR for Respondent No. 1
in both the Appeals.

CORAM : MR.JUSTICE S.D.DAVE and

MR.JUSTICE H.R.SHELAT

Date of decision: 20/06/96

COMMON ORAL JUDGEMENT (per S.D. Dave, J.)

Present orders shall govern the decision and disposal of these two Criminal Appeals, directed against the judgments of conviction and sentence pronounced by the learned Additional Sessions Judge, Palanpur, in S.C. No.122 of 1988 and S.C. No. 112 of 1991.

Both the Sessions Cases arise out the very same incident and transaction. Anyhow, the appellant no.3-Anwarkhan Akbarkhan in Criminal Appeal No.1186 of 1992 could not be apprehended in time and the trial qua him was required to be bifurcated. That was done and he came to be tried in Sessions Case No.112 of 1991. Both the Sessions Cases came to be disposed of by the very same common judgment. Anyhow, Anwarkhan Akbarkhan was shown as the appellant no.3 in Criminal Appeal No.1186 of 1992. Ultimately, on a realisation that he should have filed a separate appeal, because he came to be convicted in a different Sessions Case, he has, at a later juncture, filed Criminal Appeal No.333 of 1993. In view of this fact-situation, we have heard both these appeals together and they shall be decided and disposed of by the present common orders, as indicated by us earlier.

As we propose to decide these two appeals on two technical contentions coming from learned Counsel Mr.E.E.Saiyed for the appellants, we do not deem it expedient to dwell on the facts of the case in a rather detailed manner. Suffice it would be to notice that the complaint in question came to be filed by PSI V.M.Sonar attached to the Palanpur Police Station on 3.1.1988. According to him, he was present at Simla Gate Police Chowki and meanwhile, Police Constable Ranjitsinh had given him the necessary information saying that certain people in an Ambassador Car bearing Registration No. GJV-5403 were likely to pass from a particular point with the drug or narcotic or psychotropic substance as understood within the meaning of Narcotic Drugs and Psychotropic Substance Act, 1985 (NDPS Act, 1985). His further say is that, they had gone towards Apsara Hotel situated near a godown known as Tinwala's godown and at that time, they had seen the said motor car duly parked on the side of the road and two persons were found to be going with a packet towards the godown. The said two persons were apprehended and their identity was investigated into. The packet or bag which they were having was found to be containing 25 kg. of Opium. The necessary formalities were performed and the report of the Forensic Expert was obtained. Later on, the accused persons were charged for the alleged commission of the offences punishable under Section 17 of the NDPS Act, 1985. The original accused no.3 was also charged for the

alleged commission of the offence punishable under Sections 17 and 29 of the Act. The present appellants had pleaded not guilty of the charges levelled against them, but upon the appreciation of the evidence, which was made available to the learned Additional Sessions Judge, the view was taken that the prosecution was able to establish the charges levelled against the appellants-accused. Each of them has been sentenced to the RI for a period of ten years and to a fine of Rs.1 lakh, in default, to a further RI for one year. The above said judgments of conviction and sentences are in challenge in the present appeals before us.

Learned Counsel Mr.E.E.Saiyed, for the appellants, while raising the first technical contention urges that, the mandatory provisions contained in Section 50 of the NDPS Act, 1985 have been clearly violated and, therefore, because of this technical flaw, the accused persons could not have been convicted. By the other and the second contention which also can be said to be a technical contention, the learned Counsel urges that there has been an inordinate unexplained delay in transmitting the alleged muddamal drug to the Forensic Science Laboratory (FSL) and that when the fascimile was not legible there could not be lawful and impeachable evidence establishing that the drug or the substance allegedly recovered from the appellants had reached the FSL in the very same condition.

So far as the first contention is concerned, a reference requires to be made to the provisions contained in Section 50 of the NDPS Act, 1985. These provisions cast an obligation upon the investigating agency to inquire from the concerned person as to whether he would require that he should be taken to the Gazetted Officer of any of the Department mentioned in Section 42 of the NDPS Act, 1985 or to the nearest Magistrate. This provision appears to have been incorporated in the NDPS Act, 1985 with a view to ensure an honest, sincere, truthful and correct investigation. It affords an opportunity to the probable accused from whom allegedly the drug or the substance as the case may be has been found, to ask for his own search in presence of a Gazetted Officer or a Magistrate situated at the nearest. The provisions are abundantly clear and have been explained and interpreted and construed in certain decisions to which we would make a reference a little bit later.

We have seen the FIR at Exh.38 and have perused the evidence of PSI Sonar at Exh.137. We have also seen

the evidence of other police personnel with the assistance of learned Government Counsel Mr.S.T.Mehta. We have been satisfied upon a careful consideration of this material that the provisions contained in Section 50 of the NDPS Act, 1985 have not been followed. No witness has ever stated before the Court that such an option was given to the appellants-accused. There is not even a whisper that the appellants were asked as to whether they would require their search to be done either in presence of a Gazetted Officer or a Magistrate situated at the nearest point. Thus, on the factual aspect, we must say that the learned Counsel for the appellants is perfectly justifiable. We had requested learned Government Counsel Mr.Mehta to point out anything on the basis of which, a contrary view, on the facts, could have been taken. Anyhow, the efforts of learned Government Counsel in this direction have failed. Therefore, as a matter of fact, we shall have to record that the provisions contained under Section 50 of the NDPS Act, 1985 were not complied with.

So far as the effect of the non-performance of the obligation cast under Section 50 of the NDPS Act, 1985 is concerned, a reference requires to be made to the Supreme Court pronouncements in the case of SAIYAD MOHD.SAIYAD UMAR SAIYAD & ORS. vs. STATE OF GUJARAT, 36(2) GLR p.1315 and in case of ALI MUSTAFFA ABDUL RAHMAN MOOSA vs. STATE OF KERALA, 1995 SCC (Cri.) p.32. These decisions rendered by the Apex Court would go to show that it is obligatory on the part of the police officer to inform the citizen that he has a right to have been searched in presence of a Gazetted Officer or a Magistrate and the failure to so inform the citizen would be fatal. It is also made clear by the Supreme Court that, no presumption can be drawn that the police officer had discharged the duty. The Supreme Court also, with pertinence, makes it clear that the onus cast upon the accused under Section 54 would not be able to cure the lacuna and in such cases, the accused would be entitled to an acquittal. Thus, in our opinion, learned Counsel Mr.Saiyed for the appellants is perfectly justified in law to raise the contention before us that, as the mandatory requirements of Section 50 of the NDPS Act, 1985 have not been followed, there is an obstacle in the way of the prosecution and that the prosecution should have failed on this count alone.

The second contention coming from the learned Counsel for the appellants is that there has been an inordinate delay in transmitting the muddamal drug from the custody of the police to the custody of the FSL.

According to the learned Counsel, the delay is inordinate and that this delay would speak a lot against the prosecution especially because, admittedly the fascimile was not legible. It appears that the learned Counsel is factually right in his contention. The muddamal drug could be recovered on 3rd January 1988 at about 10.00 p.m. at Palanpur town. The evidence tendered by V.M. Sonar Exh.137, Ranjitsinh Exh.37, Dhudalal Exh.84, Anwarkhan Exh.68, and Harkulsinh Exh.117 would go to show that ultimately, the muddamal drug along with the covering letters came to be handed over to Anwarkhan on 20th January 1988 only. Lastly, according to the report of the FSL, Ahmedabad, they could reach the Laboratory on 29.1.1988. The evidence of the above said witnesses make it abundantly clear that thus, the muddamal drug and the covering letters had taken a very long time in reaching the FSL situated at Ahmedabad. This evidence also goes to show very clearly that, at various junctures, the muddamal had remained in the custody of different police constables at Palanpur Police Station. The evidence is also clear that the police constable would be in charge of the muddamal lying at the Police Station who would keep the same in a wooden box under his own lock and key. Needless it is to emphasise that for all these days, the muddamal was lying in the police station under the direct control of the police officials. In such a situation, one would like to be pretty sure regarding the non-tampering with the muddamal and the safety of the same during the transit from the police station to the Laboratory so that the very same muddamal could be examined and analyzed by the experts at the Laboratory, but, again, there is a difficulty in the way of the prosecution created and strengthened further by the report itself. The report of the Forensic Expert would go to show that the fascimile was not legible. Thus, it is clear that the fascimile when the muddamal had reached the Laboratory was not legible. Learned Government Counsel Mr.Mehta was not able to persuade us to take a different view on the above said fact which is abundantly clear from the prosecution evidence itself.

Once again, the legal consequences following from such a flaw are rather known. Firstly, going to the unreported decision in Criminal Appeal No.961 of 1988 with Criminal Appeal No.91 of 1989 decided by this Court on January 11, 1996, in which one of us (Honourable Mr.Justice H.R.Shelat) was a party, requires a reference. This decision of the Bench deals with the very same contention in light of certain other decisions. It has been said in this decision that there was an inordinate delay of 47 days in that case and that the said delay was

certainly fatal to the case of the prosecution. While coming to the above said conclusion, the Bench had preferred to have a reference to certain earlier decisions quoted in the said judgment. The Bench had firstly seen and referred to a decision rendered by this Court in the case of JHON PAUL CHRISTIAN vs. STATE OF GUJARAT, GLT Vol.29, p.100. The second was the decision rendered by this Court in Criminal Appeal No. 812 of 1987. A reported decision of this Court in CHANDRAKANT NAGINDAS MODI vs. STATE, CRIMINAL APPEAL NO. 812 OF 1987, along with a reported decision of this Court in DEVJIBHAI JIVRAJBHAI AND ORS. vs. STATE OF GUJARAT AND ANR., 1993 (1) GLH (UJ) p.23 also were referred to and relied upon. This decision, therefore, rendered by Honourable Mr. Justice Shelat makes it abundantly clear that, inordinate delay in the journey of the muddamal drug from the police station to the FSL would be fatal to the case of the prosecution. Here also, as indicated above, the muddamal drug was allegedly recovered on 3.1.1988 and ultimately, it had reached the FSL along with the covering letters on 29.1.1988. We are not able to appreciate a justifiable reason for such an inordinate delay in the journey of the alleged muddamal drug samples and covering letters from Palanpur to Ahmedabad. Coupled with this fact is a glaring infirmity that the fascimile was not legible. Therefore, the statutory ensuring aspect appears to be missing. This all would lead us to the conclusion that it cannot be said that the very same muddamal drug had reached the FSL in the very same condition and that there was absolutely no opportunity for tampering with the same.

Thus, in our view, both the contentions, which could be described as technical contentions, coming from learned Counsel Mr. Saiyed for the appellants require to be accepted and recognised. If once this is done, the outcome is obvious. The appeals shall have to be allowed and the judgments of conviction and sentences rendered by the Court below shall have to be quashed and set aside. We accordingly allow these two appeals and set aside the two different judgments in two Sessions Cases indicated above. The appellants are acquitted of the offences for which they were found guilty and came to be convicted and sentenced. The appellant no.1 - Akbarkhan Abbasbhai in Criminal Appeal No.1186 of 1988 is on bail. His bail bond shall stand cancelled. The rest of the appellants shall be set at liberty forthwith, if not required in any other criminal case or proceedings. The fine, if paid, shall be refunded to the appellants-accused. Direct service is permitted.
